

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Petition of Franklin W. Olin College of Engineering

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D.T.E. 01-95

**REPLY BRIEF
OF
FRANKLIN W. OLIN COLLEGE OF ENGINEERING**

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I. SUMMARY OF OLIN'S POSITION

This Reply Brief of Franklin W. Olin College of Engineering ("Olin") is filed in accordance with the established procedural schedule.¹ The principal parties in this proceeding apparently do agree on one thing: this case is relatively simple, it can be resolved simply and expeditiously, and it rests upon a few straightforward facts. However, BECO has a vastly different view of that simple resolution and the simple facts than either of Olin, Wellesley Municipal Light Plant ("WMLP"), or (judging from its decision in *Massachusetts Electric Company*, D.T.E. 98-122 (2002)) the Department of Telecommunications and Energy ("Department" or "DTE").

The straightforward facts (that BECO ignores) are that: 1. WMLP has provided, and has been the only provider of, electric service to the exact area that is the subject of Olin's petition for the last 30 - 40 years; 2. Due to significant system improvements over the last several years, WMLP has plenty of dedicated delivery capacity to serve Olin's full load with a

¹ To the extent that any argument asserted by Boston Edison Company ("BECO" or "Boston Edison") is not specifically addressed herein, Olin intends no concession or agreement.

high degree of reliability, while BECO would have to make significant new plant investment to provide an offering approaching comparability to that of WMLP; 3. Olin has a unique and far-reaching collaborative relationship with Babson that provides ample reasons to allow the same provider of electricity in the circumstances at hand; and 4. Olin, as a higher education institution committed to providing full tuition scholarships in perpetuity to every student, will be able to serve many more deserving students if it is not forced to invest up to about \$2,000,000 in new, duplicative BECO facilities up front and about \$500,000 extra energy costs annually.

The first implication of these facts is that Olin, so far as the property to which the Petition applies, is in the exclusive service territory of WMLP. Next, if the area in question is not the exclusive service territory of WMLP, there is certainly sufficient facts and fairness to consider whether Olin might reasonably choose to take WMLP service. Also, these facts show that the most efficient result on a broad basis is for WMLP to serve Olin.

BECO also asserts that a couple simple matters suggest a decision in its favor. However, BECO makes incorrect assumptions regarding the law, erroneously frames the issues presented in this case, and relies on mischaracterizations of the relevant facts. First, BECO relies heavily on its belief that service anywhere in Needham mandates its exclusive right to provide service everywhere in Needham, regardless of provision of service to a given area by WMLP. BECO has simply reworded the argument that Massachusetts Electric propounded and which the Department clearly rejected in ruling that municipal boundaries do not always equate to service territory boundaries. *Massachusetts Electric Co.*, D.T.E. 98-122 at 7. It is clear that BECO does not have such rights based upon the "actual service" test of

the statute (St. 1997, c. 164, §193 (G.L.c. 164, §1B(a)), or the *Massachusetts Electric* precedent that relies on the interests of the customer. It is very clear that BECO did not acquire the right to serve the undeveloped areas of Needham (at least the area of Olin's new buildings) when it entered the various contracts with the Town of Needham and the Greendale Chemical and Electric Lighting Company. Further, the issue at hand is clearly not whether WMLP has the right to serve the entire property owned by Olin. Olin has never proposed that the existing buildings along Great Plains Avenue and Curtis Road that are about 2000 feet from the new Olin buildings and that are on separately identified parcels of real estate, be served by any entity other than BECO. In fact, Olin has been extremely consistent and clear from the start that it considered the area in which its new buildings are being constructed to be within the service territory of WMLP and that any necessary ruling would relate to the area in which those buildings are being constructed:

the location of Olin's campus now under construction) was never served by NSTAR or its predecessor Boston Edison Company. Hannabury Affidavit, ¶2. In fact, the area received electric service for security lighting by WMLP when the property was owned by Babson College. *Id.*
Petition para. 4.

Similarly, Olin has been very consistent in the reasons it has asserted to take WMLP service:

WMLP has strong historical claims to serving this area (previously security lighting on this area and ongoing service to Babson very nearby in Needham). Therefore, it will be more convenient and efficient to have the unserved portion of the Olin campus services off of WMLP's lines. WMLP has already installed electrical service to a portion of the Babson campus very close to Olin's proposed take point in Wellesley. NSTAR, because of its system configuration, has stated it will only be able to physically serve the unserved portion of Olin's campus with the requisite reliability or quality of service that Olin requires if it makes very significant system improvements.

Petition para. 20.

Thus, there is no lack of clarity about the area to which Olin's Petition pertains -- it is neatly shown as Lot 2 on Exhibit IR-BE-1-1, Attachment 1-1A.² See also, Olin Initial Brief, Attachment B. Further, BECO has admitted its understanding that Olin considered the area of the new buildings to be WMLP service area. BECO Motion for Status Quo, filed January 31, 2002, footnote 8. Additionally, the logic of Olin's position may be seen graphically on Exhibit WMLP-2, Exh. 1. See Attachment A to Olin's Initial Brief. There is very clearly an area over 260 feet wide along the municipal boundary to which WMLP provided electric service, both for lighting and buildings. Olin's new buildings clearly straddle that line.

Finally, BECO recycles another old argument that the Department has previously rejected: the "snowball effect" of allowing Olin to take WMLP power will empower every other significant user in the Commonwealth to seek to take service from the lowest cost provider, to the point that the regulatory framework will be in a shambles and that distribution companies will suffer terrible financial impacts. Fitchburg Gas and Electric Company made virtually the same argument in D.P.U. 85-71 and the Department still allowed the customer to take service from Massachusetts Electric Company. Despite the dire predictions of Fitchburg Gas and Electric, that company still exists and prospers over 15 years later. BECO's claims that a ruling favorable to Olin would open the floodgates is contrary to the record and simply strains credulity. The only record evidence is that there are no other similar situations in all of

² BECO's assertion to the contrary is simply hogwash. Anyone with real estate experience, or that can read a map, can see the boundaries of Lot 2. Similarly, BECO's effort to suggest that Olin itself does not know the bounds of Lot 2 is both wrong and a total mischaracterization. First, the quote is from Mr. Joyce's (WMLP) testimony, not that of Mr. Hannabury (Olin). Further, the true meaning of the sentence lifted from Mr. Joyce's testimony becomes very clear when read in context. It is clearly the inadequacies and errors of BECO's own map (Exh. BE-ARJ-4) that is the point of Mr. Joyce's statement. Also contrary to BECO's suggestions, there is no reason for Olin to amend its Petition. The Petition clearly requested approval (to the extent necessary) for WMLP service to the area in which Olin's new buildings are being built.

BECO's service areas. Exhibit IR-OC-2-14. Thus, adverse effect on BECO, if any will be minimal.³

II. STANDARD OF REVIEW/RELEVANT LEGAL PRINCIPLES

The Department's decision in *Massachusetts Electric Co.*, D.T.E. 98-122 (2002) makes it clear what needs to be shown here. Reference needs first be made to the relevant law, St. 1997, c. 164 Sec. 193, inserting G.L. c. 164, Sec 1B(a) which in relevant part requires the Department to "define service territories for each [electric] distribution company...based on the service territories actually served on July 1, 1997, and following to the extent possible municipal boundaries." As discussed in Section III.A., below, Olin and WMLP have satisfied the actual service standard so no further showing is required. However, should the Department wish to extend the analysis, Olin still must prevail.

In D.T.E. 98-122, p. 6, the Department explained that such legislation "restated and reinforced existing law", "accorded the [DTE] a measure of discretion in resolving disputes where the boundaries between service territories implicated municipal boundaries" (*Id.* at 7), and recognized "circumstances where cleanly following municipal boundaries may not be possible without giving rise to anomalies." Thus, Olin simply needs to show that facts and fairness warrant the Department in finding service territory bounds that depart from municipal bounds. See Olin Initial Brief Sections II.D. and E., and III and IV. and *infra* sections III.B. and V.

³ BECO's worries about impacts on certainty for distribution company rights to use public ways are misplaced here as there are no public ways involved. Olin can simply take all electric service over its own property or that of Babson.

It is also useful to look at the commentary of both the Legislature and the Department as relevant to this statute. Two themes emerge: 1. "high investment costs and environmental concerns" and general concerns of efficiency and practicality militate against allowing construction of new distribution systems to provide competitive distribution service (Legislative Report, March 1997, Senate No.1714, p. 51); and 2. During the transition to more fully competitive markets, distribution franchise areas should not be changed (*Electric Restructuring*, D.P.U. 96-100, pp. 97-98, 105). The implications of these two themes to the case at hand are clear. Where Olin's new campus is within the area of WMLP's historical service and WMLP needs no system upgrade to provide the requisite level of service to Olin, so that no high investment costs and no environmental disruption would occur (especially compared with the high costs of the new plant BECO would have to install and the resulting disruption on Great Plain Avenue), the best result is for WMLP to provide service to Olin. Second, it is clear that the supplier choice closest to the Department goal of minimizing change in service would be WMLP because they have historically provided service to the exact spot of Olin's new buildings and still provide service to Babson buildings in Needham just on the other side of the adjacent parking lot. See Exhibit WMLP-2, Exh. 1 (Attachment A to Olin's Initial Brief) and Attachment B to Olin's Initial Brief.

BECO's arguments on this issue all have no substance or assume the position rejected in D.T.E. 98-122, *i.e.*, that municipal bounds define utility service area bounds. Also, BECO's suggestion that the very fact of Olin's filing its Petition here thwarts legislative intent is simply non-sensical. As the Petition stated, WMLP has historically provided "actual service" to the area of the new campus/buildings and Olin simply seeks the Department's nod

that a continuation of such service is permissible! Contrary to BECO's arguments, there is no clear franchise bound here favoring BECO, because WMLP always served the area and BECO never did.

Nor should the Department heed BECO's urgings to change the standard or consider issues not presented in Olin's Petition. First, Olin only has sought approval for WMLP service to the area of Olin's new buildings, *i.e.*, the area historically served by WMLP, which can be neatly delineated as Lot 2. Thus, the Department need not consider other areas. Also, it is not necessary for Olin to prove that the Department cannot use the municipal boundaries at all. Rather, it suffices if Olin shows that facts and fairness justify a finding of a service area bounds different from the municipal bounds. Olin has made such a showing (sections IV and V *infra*). Further, Olin has described several anomalies that would result from use of municipal bounds. *Id.*

III. OLIN HAS SHOWN THAT WMLP SERVICE IS PROPER

A. Olin's New Buildings are Within the Exclusive Service Area of WMLP.

1. WMLP's Historical Service Satisfies The Statute's "Actual Service" Requirement

WMLP has continuously served the area in question for 30-40 years. BECO has never provided electric service to any customer within well over 1000 feet from Olin's new buildings. Similarly, WMLP has served substantial load of Babson's in a continuation of the 260 foot swath of Olin land served by WMLP. Exhibit WMLP-2, Exh. 1. See Attachment A to Olin's Initial Brief. On this point no dispute exists. Nor has BECO to date addressed the statutory standard of actual service. As argued by WMLP, this then should end any inquiry --

the area was actually and exclusively served on July 1, 1997 by WMLP, so it is within WMLP's service territory – or at least not within BECO's service territory.

Olin also explained in its Initial Brief how there was continuous use of WMLP electricity on Lot 2, the purpose of which use was the support of educational functions. Olin Initial Brief Section II.C. Although the use has changed in from street and security lighting to construction of buildings, that change occurred during the time of Babson's ownership of the property. Specifically, the construction of Olin's new buildings on Lot 2 had been commenced and was continuing for 2-3 months before the formal conveyance of the property to Olin. Exhibit OC-2, p. 18. Where Babson owned the property when the WMLP electric service was for construction support, there is an even stronger showing of a continuity of use of electric service. That fact also totally buries BECO's argument that the removal of the light poles somehow undercuts the claim that WMLP should continue to provide service.⁴ Further, BECO's argument that WMLP's historical service for lighting is so different from electric service for buildings that there is no support for WMLP service to Lot 2 is also easily defeated by reviewing what service WMLP provided where and what the configuration of property title was and is. WMLP and Olin contend that, at the least, WMLP has the exclusive right to serve the 260 foot wide area along the town line shown on Exhibit WMLP-2, Exh. 1, which area historically included the lights for the parking lot and Map Hill Drive and the two and one-half Babson buildings on the other side of the parking lot, and which now includes Olin's new campus buildings and the same two and one-half Babson buildings. Naturally, the cluster of Olin buildings astride any resulting border must be allowed service from WMLP. WMLP

⁴ Of course it is only natural that the light poles would have been removed where the buildings had to be placed in the exact locations of certain poles.

historically and currently provides the same level and type of service in Needham (to the Babson buildings) as we hope it will to the Olin buildings in that area. Regarding the real estate title, BECO again tries to ignore the facts and recreate a situation more favorable to its desires. The real facts are that Olin owns a number of parcels and the historical ownership of those different parcels is relevant to electric service. Why else would BECO have separate accounts for the several different addresses on Great Plain Avenue, which coincidentally are separate numbered lots?

2. BECO Never Provided Any Service To The Area That Is The Subject Of Olin's Petition

Note that the statute refers to "territory" not customers actually served, so BECO's confused argument about WMLP never having served Olin is simply beside the point. In fact, that the statute establishes service rights and obligations on immovable territory not potentially transient customers defeats BECO's argument. BECO's position yields the anomaly that WMLP could serve Babson in this swath, but not a subsequent buyer of the swath. BECO's argument yields additional anomalous results. For example, WMLP service to the buildings (then under construction) in January – March, 2000 when Babson still held legal title would be deemed proper, but once title shifted, WMLP service was not proper. Consider the confusion that would result had the parties employed a model of selling the land and buildings after construction! Many other anomalies can be identified – relating to the parties' collaboration being thwarted by an inflexible rule on service territories and the differential treatment (regarding the source of electric service) of neighboring academic buildings both in Needham.

BECO's argument that it satisfies the "actually served" standard because it was serving other parts of Needham is also unavailing. That argument presumes the answer, *i.e.*, the

service territory bound immutably match municipal bounds. Such conclusion, of course, was exactly what the Department correctly rejected in *Massachusetts Electric Co.*, D.T.E. 98-122, p. 7 (2002). The Department's conclusion was the only possible conclusion because strict adherence to municipal boundaries would lead to anomalies such as WMLP being precluded from serving the two and one-half Babson College buildings in Needham.⁵

First, as to the property in question, BECO did not even provide any electric distribution service, much less qualify as the "sole provider of electric distribution service".⁶ Further, BECO greatly exaggerates the legal rights granted by the few contracts of limited duration and coverage that Olin's Initial Brief thoroughly described.⁷ See Olin Initial Brief, Section II.A. The Department has previously observed, and should do so here, at least as to Olin's property, that franchise grants are to be strictly construed against the grantee. Simply put, whatever rights (beyond the limited rights provided by such contracts) BECO may have accumulated by virtue of its years of service in Needham, there is no basis in law or in fact to extend those "rights" to the previously undeveloped area on the Wellesley town line, now occupied by Olin. This absence of rights in BECO is even more clear as to the area along the

⁵ Note also under BECO's approach, BECO would have to provide more costly service to the MWRA metering station, Cartwright Road, etc.

⁶ Because of WMLP's service to at least the 260 foot swath in Needham described above, BECO's statement that it was the sole provider in Needham is false. However, service to Needham as a whole is not the issue. Rather the issue is service to the property that is the subject of the Petition.

⁷ D.P.U. 96-100 Model Rules and Legislation Proposal, p. 101, fn. 69, citing *Charles River Park v. Boston Redevelopment Authority*, 28 Mass. App. Ct. 795, 808 (1990) (public grants must be strictly construed against the grantee), citing *Prudential Insurance Co. of America v. Boston*, 369 Mass. 542, 547 (1976) (nothing will be included in the grant except what is granted expressly or by clear implication); *Cleveland v. Norton*, [60 Mass.] 380, 383-384 (1850) (in all grants, made by the government to individuals, of rights, privileges, and franchise, the words are to be taken most strongly against the grantee). None of the Needham grants or contracts come anywhere close to authorizing BECO service to the area that is now Olin's property – much less doing so in an exclusive basis!

border, which area was actually served⁸ by WMLP.

3. BECO's Service To Other Parcels Is Not Legally Pertinent Or Operationally Significant

Finally, the Department must ignore and/or reject BECO's arguments concerning the five lots owned by Olin along Great Plain Avenue. Even if the existing BECO service to those lots had any implication for Lot 2 which has only been served by WMLP over the last several decades, BECO overstates the nature and extent of such service. First, it is not at all clear that the Olin property BECO serves is greater than the area WMLP served. (Remember BECO understated the WMLP service area very significantly. Tr. 3: 289). Second, the level of use was not that great – just being for five houses. Further, the Babson baseball field is not lit and the "press box" is only slightly less distant than the Great Plains Avenue houses (which are almost 2000 feet away) from Olin's new building. The question for resolution here concerns not all of Olin's property – it is only the property on which the new buildings are being constructed – (Lot 2), as referenced in Olin's original Petition.

B. Alternatively, the Record Yields Ample Reasons For Departing From Municipal Boundaries As Service Area Bounds

1. BECO's Constrained Interpretation Of The Law Must Be Rejected As Massachusetts Electric's was Rejected

The second part of the statutory test concerns whether "facts and fairness" support service area bounds different from municipal bounds. BECO argues that exception is only

⁸ Note that the statute contains no limits on what is actual service. As noted by WMLP (initial Brief, pp. 7-9) that statute must be given its plain meaning. There was clearly actual service. Whether or not that historical actual service was substantial, or was the same as current or future service is not to be considered under any proper statutory construction.

available to a customer that straddled a service territory boundary as of July 1, 1997.⁹ BECO's reading ignores the point of the Department's decision, *i.e.*, that anomalies exist and must be addressed by a factual specific inquiry. If the only permissible departure from utility bounds fixed identically with municipal bounds was the Stop and Shop circumstance, then the Department could have specified that rule. Of course, the *Massachusetts Electric* decision did not establish such a rule, nor did it say no other circumstances would qualify. In fact, in that decision the Department indicated an openness to a variety of facts by its references to the facts and fairness in a given case. Further, by identifying the Design Housing case (where WMLP is now serving lots entirely in Needham without any straddling) as similar to the Stop and Shop situation and as being a case where departure from municipal bounds was proper (D.T.E. 98-122, fn. 4), the Department confirms that anomalies other than straddles may exist. As established in detail in Olin's Initial Brief, Section VI.B., the case at hand involves potential anomalies should the municipal bounds be used to define exclusive utility service bounds. Also in many ways, facts and considerations of fairness exist that demand variation from municipal bounds, as discussed at length in Olin's Initial Brief and herein.

2. BECO Cannot Efficiently Provide Olin's Required Service

BECO's other argument against making exceptions to municipal bounds -- that BECO can provide the required service -- is actually false! Most significantly, BECO is not ready or

⁹ Actually, the Department might properly consider Olin a customer legitimately straddling a service territory boundary -- such service territory boundary being the line shown in Exh. WMLP-2, Exh. 1 (Attachment A to Olin's Initial Brief) where WMLP's service extended. While that is certainly one case where a departure from municipal boundaries is proper, it is equally clear Stop and Shop's case cannot be the only anomaly possible.

able to provide the required level of service to Olin, whether or not it is "willing".¹⁰ As described in Section V. below, there is simply no substantial record evidence that BECO can serve Olin at the level required by Olin, which is the level at which WMLP can provide service. Even if the Department would entertain BECO's claims that provision of service over BECO's existing facilities might, contrary to all record evidence, provide service with sufficient quality and reliability for Olin's initial, limited operations, the fundamental issue of BECO needing very significant system improvements to serve Olin's full load remains as a problem for the future. Thus, BECO's approach would yield considerable inefficiencies now and in the future. Exhibit OC-2, pp. 11-12. Whether or not BECO adequately serves other large customers elsewhere is irrelevant (and perhaps overstated given the various reports of BECO's poor service. Exhibit OC-2, pp. 3-4) – BECO itself has admitted it cannot provide the requisite level of service without addition of expensive new plant that duplicates existing WMLP plant.

3. Olin's Rights And Presence In Wellesley Support Allowing Service By WMLP

Olin asserts that it need not show any presence in Wellesley because of WMLP's historical actual service to the area of Olin's new buildings in Needham. Nonetheless, Olin does have a significant presence in Wellesley. BECO's arguments regarding Olin's mailing address and source of water, sewer and certain other services are at best, only part of the story and are in no way controlling. Certain of the utility services (telecommunications and cable

¹⁰ Such willingness is belied by BECO's deficient customer service and relations efforts. As described at length in Olin's exhibits, BECO was very non-responsive to expressed concerns over quality and reliability of service (Exh. OC-2, pp. 3-4), was bullying in its efforts to "close" the sale (Tr. 2: 165-174), and was unwilling or unable to offer, at any time during a discussion period of over two years, any alternatives or approaches that would have avoided very significant up front payments by Olin (Exh. OC-2, pp. 5-6, 11-12).

are from providers that are in both Needham and Wellesley) and natural gas is shared with Babson, so the source of that service may change in the future.

Regarding Olin's real estate interests, BECO very carefully specified only Olin's interests in fee that exist currently. However, critical to Olin's original permitting and its ongoing operation, is its significant easement rights (*i.e.*, 60,000 square feet) that were conveyed to it by Babson without regard for any matters of electric service. See Olin Initial Brief, section II.D. Exhibit IR-BE-1-18. Also, although the Department must consider Olin's real estate interests and buildings as they now stand, in this case (much more than others), the Department must also take a forward-looking view. For example, Olin has a Phase II to its construction project that will add four more significant buildings to its central campus. Exhibit IR-BE-1-5, Attachment 1-5C. Just because those buildings are not yet under construction the Department cannot ignore them. Indeed, it would be foolish for Olin's management to obtain electric service arrangements only sufficient for the buildings that are now approaching completion, without regard for the Phase II buildings.¹¹ Similarly, a decision in this case that failed to recognize the clear record facts that Olin and Babson have such an integrated collaborative relationship that Olin will be acquiring additional real estate ownership rights in Wellesley -- specifically including the planned joint administration building in Wellesley that is on the books (Exh. IR-BE-1-1 Suppl.), would have a misplaced basis. See Olin Initial Brief, Sections II.C. and D. This is especially the case where the property acquisitions are entirely related to Olin's educational mission and wholly apart from any considerations of electric service and service territories.

Further, the Olin-Babson collaborative relationship cannot be stressed too much. Evidently recognizing the significant import to this case, BECO has tried to minimize the relationship by characterizing (only on brief, without any record basis) it as commonplace, like some colleges that might have a few students that can take a class or two at a nearby college. There is simply no basis to so minimize the Olin-Babson collaboration. Very extensive and unrebutted evidence shows that this is unique and creates a practical identity of Olin and Babson in many operational and educational ways. As stated in Exhibit OC-1, Exh. B, Olin and Babson are "separated only by the town lines of Needham and Wellesley". Section I.B.2. of Olin's Initial Brief shows just how extensive this collaboration is and will be and consequently how Olin is integrally tied to facilities in Wellesley. Even if the Department does not find that this relationship itself creates a sufficient basis to allow WMLP service, that relationship is so unique and significant that this case would be clearly distinguishable from virtually any possible case that follows. BECO's effort to analogize this collaboration to two fast food franchises on opposite sides of a state line is humorous but has no applicability here because it, like most of BECO's arguments rests on a presumption of the necessary legal conclusion. In the case of state lines and state taxes, the established state line is immutably set. In the case of municipal and utility service area bounds, the Department has ruled that those are not always immutably identical, so BECO's argument fails.

4. Considerations Of Olin, The Customer, Require Allowing WMLP To Provide Service

Olin also explained in its Initial Brief that the benefits to Olin of taking service from WMLP were relevant in making the "facts and fairness" inquiry under the Massachusetts

¹¹ Yet this is exactly what BECO seems to be doing in its new argument that some hypothetical, speculative and

Electric decision. The Department clearly stated that in these circumstances it would be reasonable to focus on the interests of the customer – not the combatant utilities. *Massachusetts Electric Co.*, D.T.E. 98-122 at 8. The assessment of benefits to Olin does just that. Olin Initial Brief, Sections III. and IV. Apparently conceding that Olin would realize significant benefits by taking service from WMLP, BECO argues that such benefits are irrelevant and cannot be considered. BECO is correct that the record shows a range of costs to interconnect Olin with BECO and that the level of cost of the upper end option, *i.e.*, the option comparable to WMLP service and what is necessary for Olin, is "substantial". At the other end of the spectrum of options BECO presented, BECO may consider an upfront cost of over \$300,000¹² to Olin to be "very little", but we can assure the Department that Olin does not share that view. In any event, such lesser amount is irrelevant to the inquiry, because the related option is not feasible for Olin. See Olin Initial Brief, section IV.A. Certainly, it is not reasonable in all cases to determine the service provider on the basis of costs to the customer, but consideration of such costs is reasonable here, where: (i) there is a toss-up regarding which utility's service territory encompasses the customer¹³; and (ii) a large portion of the cost differential results from the basic fact that the BECO would need to make a major system improvement to provide the required level of service to Olin.¹⁴ Thus, it is reasonable to consider and supportive to present the comparison of alternative approaches to providing service to Olin.

undescribed options might be able to allow BECO to serve Olin. See section IV.F. *infra*.

¹² Options 2, 3 or 4 (Exh. BE-ARJ-2) less a revenue credit of \$300,000 just splitting the difference of the maximum possible credit due to the considerable uncertainty on the record of the availability of such a credit.

¹³ Note that here, Olin views a characterization of the decision as a toss-up is most charitable to BECO.

¹⁴ Note that such costs are unnecessary because of the WMLP plant that is available for delivering electricity to Olin. In this context, the Department should consider the greater societal efficiencies that would result from an avoidance of installation of the extensive new BECO facilities, that is essentially duplicative plant.

C. Creative Conveyancing is Totally a Non-Issue Here

The absurdity of BECO's argument regarding "creative conveyancing" is shown by its efforts to label everything but the kitchen sink as creative conveyancing. In BECO's mind, the fact that Olin has explained its close, collaborative relationship with Babson is "creative conveyancing." Nothing could be farther from the truth, as described below.

First, it is necessary to explore the Department's discussion of what is creative conveyancing, and what impact results from a finding of creative conveyancing. As discussed in the *Massachusetts Electric* decision, it is necessary that the action in question be (i) the transfer of real estate interests that (ii) is intended to thwart the legislative intent¹⁵ to confirm distribution company franchise borders. It is plain to see that the Collaboration Agreement is in no way a conveyance at all. Further, the collaborative relationship came to life at the very birth of Olin College in 1997 when, the intent was very broadly to achieve synergies but when no one would have had any knowledge or intent concerning the details of the source of electric service. Exhibit IR-BE-1-7, Attachment 1-7C. In fact, the record is clear regarding the intent of the Collaborative Agreement: it is to further the educational goals of both colleges by joint purchasing, administration, etc.

Babson College and the F. W. Olin Foundation, Inc. (as the sponsor of the Franklin W. Olin College of Engineering), declare by this document that it is their intent that Babson College and the Franklin W. Olin College of Engineering will collaborate in every possible way to achieve excellence in the education and co-curricular experiences of their respective students, provide a stimulating and professionally fulfilling environment for their faculties, and through administrative efficiencies strengthen the financial condition of both institutions.

¹⁵ Note the discussion of legislative intent above in Section II.

Id.

It naturally follows then that with respect to the joint administrative and educational buildings (Exh. IR-BE-1-1 Suppl.; See Attachment B to Olin Initial Brief), even if there is conveyancing in the target time frame of 2004-2010, the intent is entirely different from creative conveyancing.

As to Olin's purchase of Parcel A, on one level the Department need not even consider it because it is neither the proposed location of Olin's switchgear (should the Department grant the requested relief), nor is Olin relying on its ownership of Parcel A as a basis for establishing applicability of WMLP service territory. See Olin Initial Brief, pp. 34-35. Even if the Department determines acquisition of Parcel A to be "creative conveyancing" it does not matter because the Department decision was clear on the implications of "creative conveyancing". Assuming the existence of some creative conveyancing, that does not defeat a claim of service entitlement from the other utility – rather the customer just has a higher burden of showing that allowing the Petition will thwart legislative intent **if the Petitioner relies on the creatively conveyed property to justify service from the other utility**. D.T.E. 98-122 at 11. Here, there is no reliance, so again there is no adverse impact on Olin's Petition.¹⁶ Further, granting Olin its requested relief will not thwart legislative intent because: (i) it will not cause incurrence of large unnecessary costs or environmental disruption and (ii) it

¹⁶ Olin believes that even apart from the foregoing reasons, acquisition of Parcel A does not adversely affect Olin's Petition because it did not acquire that land to thwart legislative intent. Rather, Olin's new building were already in WMLP's service area and Olin only purchased the land to accommodate WMLP's desire to deliver electricity within Wellesley town bounds. Tr. 1: 37-38. That Olin does not currently plan to use the parcel is irrelevant because it has Babson's agreement to convey property rights to allow Olin to co-locate Olin's switchgear with Babson's switchgear in a yet more beneficial location in Wellesley.

will not change what entity provides distribution service to the area in question. See Section I *supra*.

IV. REASONED CONSISTENCY WITH D.P.U. 86-45/86-114 REQUIRES WMLP SERVICE TO OLIN

In *Boston Gas Co. v. Department of Public Utilities*, 367 Mass. 92 (1975), the Supreme Judicial Court ruled that the Department's decisions had to show "reasoned consistency" particularly for decisions concerning the same utility. In *Wellesley Department of Public Works*, D.P.U. 86-45/86-144 (1987), the Department required WMLP to serve certain customers on Cartwright Road in Needham over Wellesley's objection. That decision was based upon the facts that Wellesley had historically served other customers in the immediate area and that Wellesley could serve the new customers without significant further plant investment, as compared to what BECO would have to invest. The relevant facts for Olin are sufficiently close to those of Cartwright Road to merit substantially similar rulings by the Department. WMLP has historically provided service to the exact area of Olin's new buildings (as opposed to simply nearby) and WMLP can provide the requisite service with only minimal costs -- as shown in Olin's Initial Brief to be about 1% the costs for the comparable BECO option. Whether WMLP actually relied upon the Department's ruling regarding Cartwright Road in sizing the lines it recently installed to provide service to Babson is not known on this record, but it is a fair inference. Regardless, where the Department made a ruling in the Cartwright Road case, that presumably cost WMLP money, it is only reasonable to expect that elsewhere WMLP can benefit from the same legal position. Therefore, consistency of decisionmaking requires that WMLP serve Olin's new buildings/campus. The

factual distinctions that BECO asserts to distinguish Cartwright Road and the other cases of WMLP serving customers in Needham are immaterial. Particularly curious is BECO's reliance on a revenue credit concept to distinguish the cases. BECO expressed so many different positions on the availability of a revenue credit to Olin it is most difficult to know what, if any credit, would be made available by BECO. Suffice it to say that the likelihood of Olin receiving any substantial revenue credit must be considered with a large grain of salt.

V. BECO IS NOT CURRENTLY ABLE TO PROVIDE THE REQUIRED SERVICE EFFICIENTLY AND SUFFICIENTLY RELIABLY

BECO argues in its Initial Brief that it is “ready, willing and able to provide reliable and cost-effective distribution service to Olin, in accordance with its rates, terms and conditions.” BECO Brief, p. 19. Nowhere in BECO’s brief, however, does BECO even attempt, much less succeed, in showing that it can provide service comparable in quality and reliability to the service already available from WMLP at anything approaching the cost and in anything approaching the time-frame that WMLP can provide it. For all of the reasons set forth above and in its Initial Brief, Olin believes that its new campus is in WMLP’s exclusive service territory. *See, e.g.*, Olin Initial Brief Sections I.A., II.B., *supra* Section III.A. Even assuming *arguendo* that Olin is not in WMLP’s exclusive franchise area, however, this is a situation in which, consistent with the Department’s *Massachusetts Electric* decision, facts and fairness fully justify service from WMLP. Those facts and fairness include the marked advantages of WMLP service on many measures, including: cost; timing; avoidance of wasteful duplication of plant; and reliability.

A. BECO's Connection Charge to Olin Would Be Far Greater than WMLP's Connection Charge

As demonstrated in Olin's Initial Brief, WMLP already has in place a dedicated, wholly-underground circuit that is serving Babson and that has the capacity also to serve Olin's projected load, up to and including Olin's projected load on full build-out of 4MW. Olin Brief, Sections III.A, B. If Olin is permitted to take permanent service from WMLP, this circuit – Line 1511 – would be dedicated to service for Babson and Olin alone. Tr. 3: 322. Similarly, the same already-in-place back-up line currently providing back-up service to Babson – Line 1531 – would also be used to provide back-up service to Olin. Tr. 3: 322-23. The total cost to Olin for WMLP to connect to Olin's switchgear would be \$18,000. IR-BE-8-3. Given that the only construction required would be the installation of approximately 200 feet of cable, WMLP could provide Olin with dedicated, underground service virtually immediately. *See id.*

By contrast, the cost for Olin to connect to a wholly-underground, dedicated normal service from BECO would be exponentially greater. Indeed, while BECO maintains that an option-by-option comparison of BECO costs versus WMLP costs is not possible, in fact an “apples-to-apples” comparison of WMLP's proposal to the only comparable option proposed by BECO – BECO's so-called Option 1B – is perfectly straight-forward. *See* Exh. OC-2, pp. 11-12. Put simply, BECO does not currently have an underground circuit available to serve Olin, and to provide one, together with back-up service, would require construction to the tune of \$1,600,000, all of which would be borne by Olin. *See, e.g.,* Exh. BE-ARJ-1, pp. 9-13; Exh. IR-OC-1-11 (“In this case . . . the entire reason for any upgrade or additional facilities

would be to serve Olin and thus the entire cost responsibility, less any applicable revenue credit, would be assigned to Olin.”).

While BECO’s terms and conditions do provide for a potential revenue credit, the amount of and timing of such a credit remain, even at this late juncture, very much a question mark. Indeed, while BECO claims that the amount of the revenue credit has been a moving target because of “Olin’s changes in underlying assumptions as the case proceeded,” BECO Brief at 23, in fact the moving target has been BECO’s explanation of how the revenue credit actually would be calculated. For example, BECO told Olin in June 2001 that the revenue credit would be calculated based on Olin’s actual load at the end of the first, or perhaps second, year of Olin’s service, Tr. 3: 371-73; Mr. Niro (who was present for the meeting at which BECO described the revenue credit for Olin) indicated on cross-examination that the revenue credit would be calculated based on the load for the first year, Tr. 4: 593-94; and it was not until Mr. Niro’s re-cross examination that, suddenly, BECO suggested for the first time that a customer might receive further revenue credits “down the line” to the extent its load increased over time. Tr. 5: 810.

In any event, the maximum possible revenue credit BECO has ever suggested Olin might realize – which assumes an actual load of 4MW, the highest load that it is estimated Olin might attain in eight to ten years, after full build-out of Olin’s campus – is \$644,000. Exh. IR-OC-1-7; Exh. OC-2, p. 12. This would leave Olin holding the bag for approximately \$1,000,000 in construction costs.¹⁷

¹⁷ Even assuming the correctness of Mr. Niro’s belated claim that revenue credits are awarded over time, as loads grow, Olin’s load after full build-out might well be only 3 to 3.5 MW, and thus Olin’s revenue credit would be significantly less than \$644,000. See Exh. IR-OC-1-7; Tr. 4: 593-94.

BECO continues to complain that Olin did not give BECO sufficient information to design specific plans tailored to Olin's needs, and thus the five options presented on June 8, 2001 were only "conceptual." BECO Brief, pp. 19-20. As shown in Olin's Initial Brief, however, Olin did, in fact, provide BECO with the basic facts necessary to develop service options: the total expected load after full build-out; the fact that initially only part of this load would be coming on line; the location of the campus; the fact that Olin wanted a back-up supply; and the fact that Olin wanted very high-quality and reliable service. Olin Brief, pp. 34-35. In fact, the record makes plain that what BECO really wanted from Olin was the initiation of a work order, and that it was only with this commitment in hand that BECO was willing to proceed beyond its "conceptual" options anyhow. *Id.* Indeed, according to Mr. Jessa himself, BECO told Olin at the June 2001 meeting at which the "conceptual" options were presented and discussed that "we would require a work order request from them before starting any more detailed engineering work" Exh. BE-ARJ-1, p. 9.

In any event, there plainly is no information in Olin's control that BECO needed to determine the cost to construct facilities comparable to the dedicated underground service already available from WMLP. BECO, not Olin, knows where along the public ways it would install an underground circuit to serve Olin, and BECO, not Olin, knows how much BECO would charge Olin to construct the necessary duct bank and cable. BECO's estimate of \$1,600,000 to construct these facilities did not depend on anything other than the knowledge that Olin wanted BECO to tell Olin what it would cost for BECO to provide service comparable to that available from WMLP.

Thus, an “apples to apples” comparison of the cost to Olin for connecting to a dedicated underground normal service from WMLP versus a dedicated underground normal service from BECO is simple: \$18,000 for the connection to WMLP versus at least \$1 million in construction costs for the connection to BECO.

B. BECO Has Estimated It Would Take More Than a Year for It to Construct Facilities To Serve Olin Comparable to Those That WMLP Already Has in Place

Similarly, a comparison of timing is simple and straightforward: dedicated underground service from WMLP is available virtually immediately, while BECO has estimated that construction of the underground circuit alone would require 75 crew weeks. Exh. IR-OC- 1-12; *cf.* Exh. IR-BE-8-3.

C. It Is Not Certain That BECO Could Obtain the Permits Necessary to Construct Facilities Comparable to Those That WMLP Already Has in Place

A comparison of the relative certainties of being able to provide dedicated underground normal service is also simple. WMLP clearly can do so, since it has the necessary facilities already in place. BECO’s ability to do so, however, depends on whether it can obtain the necessary permits from the Town of Needham, a proposition far from certain given that Needham repaved Great Plain Avenue in 1999 and might well be reluctant to have it reopened a mere three years later. Exh. OC-2, p. 12.¹⁸

D. BECO’s Construction of Facilities Comparable to Those That WMLP Already Has in Place Would Result in Needless and Wasteful Duplication of Plant

¹⁸ While Mr. Jessa suggested in his prefiled testimony that Olin had lost the opportunity to plan street work in Needham streets coincident with paving, see Exh. BE-ARJ-1, p. 17, Olin was only beginning to explore its options for electrical service in May 1999 when the paving took place. Exh. OC-2, p. 14. Indeed, Mr. Jessa himself attended a preliminary meeting on May 14, 1999. Exh. BE-ARJ-1, p. 14.

Indeed, given that WMLP already has the necessary facilities in place, BECO's construction of new facilities to provide the same service would be unnecessary, duplicative and wasteful. Preventing such inefficiencies is, of course, one of the paramount objectives of regulating monopolies such as electric distribution companies. See J. Bonbright, A. Danielson, and D. Kamerschen, Principles of Public Utility Rates (2d ed. 1988, p. 18-19 (unrestrained direct competition with natural monopoly "is wasteful of resources because it involves unnecessary duplication of facilities.")).

E. WMLP Can Provide Superior Reliability

As Olin showed exhaustively in its Initial Brief, WMLP service would be more reliable than BECO service on any number of measures, including: (1) WMLP's existing underground circuit is more reliable than would be BECO's proposed, yet-to-be-built underground circuit; (2) WMLP's normal and back-up circuits originate at different WMLP substations, while BECO's circuits would originate at the same substation; (3) BECO's service to Olin would come from BECO Station 148, which has a history of voltage regulation problems, while WMLP's power to the Olin area comes from a different BECO station, Station 292; and (4) WMLP's record of service is far superior to BECO's. See Olin Brief, Section IV.A.

BECO chooses largely to ignore these reliability issues, making conclusory but unsubstantiated claims that it is ready, willing, and able to provide reliable service. See, e.g., BECO Brief, p. 19. Actions speak louder than words, however, and the record in this case establishes that in the very recent past BECO has had significant difficulty in delivering reliable service, both in general and with respect to Olin's existing temporary administrative buildings in particular.

With respect to service in general, the record shows that BECO recently ranked dead last in customer satisfaction in a survey conducted by J.D. Power regarding service provided by 41 large utilities in the United States. Exh. OC-2, pp. 18-19 & Attachment B. And the Department itself recently assessed a penalty of \$3,794,200 against BECO for failing to meet performance goals for the year ended August 31, 2001 for three measures, two of which – SAIDI and SAIFI – are directly related to service reliability. D.T.E. 01-71A, p. 14 (2002).

With respect to BECO's existing service to Olin's administrative buildings along Great Plain Avenue, the record shows that Olin first complained to BECO in November 1999 of voltage fluctuations and flickering lights, Exh. OC-2, p. 3; that Olin continued such complaints when Mr. Niro became account executive in March 2000, Exh. OC-2, Att. A, p. 3; that BECO promised to look into the matter in March 2000 and to install equipment to monitor the situation, *id.*, p. 4; that, despite its promise, BECO never did install the monitoring equipment, Exh. OC-2, p.3; that, having seen no action at all from BECO as of July 2000, Olin again requested action, Exh. IR-OC-1-6, Att. IR-OC-1-6, p. 21 (7/10/00 letter, S. Hannabury to J. Niro); that by around early August 2000 Olin provided BECO with such data as Olin itself had available – data from its uninterruptible power supply, or "UPS," system – and, having still heard nothing by August 18, 2000, followed up with an email, Exh. IR-OC-1-6, Att. IR-OC-1-6, Issues Profile Report p. 3; that the very first time BECO's own internal records show any action at all on Olin's complaint is in an email dated October 4, 2000, in which it is clear that BECO had not yet bothered to investigate its own records regarding the issue and had not yet bothered even to examine all of the UPS records that Olin provided two months earlier, *id.*, Issues Profile Report p. 5; that BECO finally did some work in November 2000 that, it

claimed, would fix the problem, Exh. IR-OC-1-6, Att. IR-OC-1-6, pp. 22-23 (11/15/00 letter, J. Niro to S. Hannabury); but that this work did not, in fact, remedy the situation, and as of the commencement of hearings Olin was still experiencing flickering lights in its administrative buildings, Exh. OC-2, pp. 3-4.

BECO suggests that, after the work was performed in November 2000, it heard nothing further to suggest that problems in its service to Olin persisted until Mr. Hannabury recently said so. See BECO Brief, p. 46 n. 21. The record, however, shows otherwise. First, contrary to BECO's assertion, Olin did not tell BECO in June 2001 that the problem was "much better." See *id.* Rather, BECO's own notes of the relevant meeting merely say that the November 2000 work "helped [the] situation at offices." Exh. IR-OC-1-6, Att. IR-OC-1-6, 6/4/01 Notes p. 3. These notes were taken by Mr. Niro, who admitted he is not a stenographer; who admitted he did not record every word uttered at this meeting; and whose partisanship at the hearing of this matter, while perfectly understandable, was also readily apparent. Tr. 3: 446.

Thus, the notes do not, as BECO seems to suggest, establish that Olin failed to disclose that problems persisted after November 2000. See BECO Brief, p. 46 n. 21. To the contrary, Mr. Hannabury testified that, while he could not specifically recall doing so, his assumption is that the continuing problems would have been raised, Tr. 3: 354, and Mr. Hannabury's assumption is borne out by the record. For example, in an April 30, 2001 letter, Olin counsel informed BECO counsel, not that BECO had adequately addressed reliability issues, but rather that reliability continued to be of very significant concern to Olin. Exh. IR-BE-1-16, Att. IR-BE-1-16, pp. 29-30 (4/30/01 letter, E. Krathwohl to C. Keuthen). Counsel further provided

BECO with Olin UPS records. *Id.* These records, which are attached to the affidavit of Mr. Hannabury that accompanied Olin's Petition, do not end in November 2000 but instead document problems persisting right through March 2001.¹⁹ See Exh. OC-1, ¶ 3 & Exh. D, *passim*. Indeed, a cover memorandum prepared by Olin employee Manuel Amaral on April 25, 2001 reveals that in the first three months of 2001 alone – after BECO had purportedly fixed the problem – there were two deep momentary sags in voltage of approximately two minutes' duration; there were two “blackouts” resulting in the initiation of shutdowns, one of which lasted for 38 minutes and the other of which lasted for 55 minutes; and there was an occasion of high input voltage of 135 V, which again resulted in the initiation of system shutdowns and which lasted for 292 minutes. Exh. OC-1, Exh. D p. 1.

Moreover, Mr. Niro's notes of the June 4, 2001 meeting reveal, not that BECO told Olin the work already performed had remedied all of the problems, but instead continued to promise that future fixes should help. See Exh. IR-OC-1-6, Att. IR-OC-1-6, 6/4/01 Notes. For example, the notes show that Mr. Jessa told Olin that the circuit serving Olin, Circuit 148-H1, had been “walked down” in 2000 and that necessary repairs thus identified would be “done by end of year 2001.” *Id.*, p. 2. Mr. Jessa further represented that “after [the] improvements [the] circuit should be a better performer.” *Id.*, p. 3.

All of this demonstrates that Olin's concerns regarding the quality and reliability of BECO service are valid and that BECO, despite repeated requests from Olin, has failed ever to address the situation at Olin's temporary administrative buildings adequately. Not surprisingly, then, BECO's approach in its Brief is essentially to dismiss reliability concerns as

¹⁹ The UPS reports appear to have been printed on April 13, 2001 and to reflect information through the end of the month just ended. Exh. OC-1, Exh. D.

legally irrelevant rather than to address them in any meaningful way. *See, e.g.*, 43-47. However, assuming *arguendo* that the Department concludes that Lot 2 is not within WMLP's exclusive service territory, this certainly is a case in which, consistent with *Massachusetts Electric*, facts and fairness – including reliability concerns – militate heavily in favor of permitting Olin to take service from WMLP. Indeed, under the facts and circumstances presented here, it would be decidedly *unfair* to require Olin to take service from a distribution company whose attitude toward customer concerns regarding reliability and quality is so cavalier.

F. BECO's References to Purported "New" Service Options Should Be Ignored

BECO makes several references in its Initial Brief to new service options that it purportedly developed only after hearing the testimony in this proceeding. *See, e.g.*, BECO Brief, pp. 20-21. Several observations are in order.

First, the only record evidence that such additional, previously undisclosed options exist are Mr. Niro's gratuitous, non-responsive references to them in his oral testimony, *see* Tr. 4, p. 610, and Mr. Jessa's general and conclusory reference to such in his direct oral testimony. Tr. 4: 669. As the Department has recognized with regularity, general and conclusory statements do not constitute evidence sufficient to establish the proposition for which they are offered. *E.g., Investigation by the Department re Collocation*, D.T.E. 98-57 – Phase I, 2001 Mass. PUC LEXIS 26, p. 26 (2001). Accordingly, the Department should determine that there is insufficient record evidence to establish that any BECO options exist beyond those described in Mr. Jessa's prefiled testimony (*see* Exh. BE-ARJ-1, pp. 9-13).

Second, BECO's claim that it did not previously have access to the information purportedly necessary for it to devise these new, previously undisclosed options is untrue. BECO points to two facts that it purportedly learned only during the evidentiary hearings. The first is that Olin does not require completely separate and redundant lines. BECO Brief, pp. 20-21. Nowhere in the record, however, did even Mr. Niro say that this "new" fact led to the development of new service options.²⁰ Moreover, the contention is belied by the record, which shows that on May 26, 1999, just twelve days after Mr. Jessa attended an initial meeting concerning Olin's electrical needs, Olin's consultant, BR+ A, advised BECO that Olin wanted back-up as well as normal service, and that BR+ A proposed, as one possible option, that both the normal line and the back-up line be provided along Great Plain Avenue. Exh. IR-OC-1-6, Att. IR-OC-1-6, pp. 10-11.²¹ By contrast, there is nothing in the record to suggest that Olin ever affirmatively told BECO that normal and back-up service needed to be "completely independent and redundant" in the sense that BECO appears to be using the terms. Finally, BECO had ample opportunity on June 8, 2001, when it presented its options to Olin, to confirm that its purported assumptions were valid and to develop new options at that time to the extent its assumptions were wrong.

The other fact that BECO claims it learned only during the evidentiary hearings is that Olin's initial load might be 1 to 1.5 MW. BECO Brief, p. 21. Again, however, this is not the case. Mr. Hannabury stated in his affidavit in support of Olin's Petition, filed on November 9,

²⁰ Indeed, BECO's citation to Mr. Niro's testimony in support of this argument is mysterious, inasmuch as Mr. Niro's testimony at that juncture had nothing to do with whether Olin required independent and redundant normal and duplicate supplies. Compare BECO Brief, p. 21 with Tr. 5: 815.

²¹ Indeed, given that it was Mr. Jessa who developed the response to BR+ A's suggested options for back-up service, see Exh. IR-OC-1-6, p. 16), it is difficult to fathom why, as he seemed to testify, Mr. Jessa assumed that Olin's normal and back-up service had to come in from different directions, *i.e.*, from Great Plain Avenue and Forest Street. Tr. 6: 870.

2001, that “Olin will not reach its maximum load for several years” Exh. OC-1, ¶ 4. Similarly, Mr. Hannabury stated in his rebuttal testimony that Olin informed BECO (as it informed WMLP) of, *inter alia*, “our expected load as it would be upon initial operation and how we projected the campus would grow” Exh. OC-2, p. 15. Indeed, Mr. Niro’s notes of the June 8, 2001 meeting reflect a discussion of whether BECO would reserve capacity for Olin if Olin’s total ultimate load were not needed right away. Exh. IR-OC-1-6, Att. IR-OC-1-6, 6/8/01 Notes p. 1. And, of course, BECO had ample opportunity at the June 8 meeting to explore whether its purported assumptions were correct regarding the timing of Olin’s load requirements.

Moreover, even assuming *arguendo* that BECO did not have full opportunity to explore the issue before the commencement of this proceeding, Mr. Hannabury, again, made clear in the affidavit filed in support of Olin’s Petition that Olin would not realize its full load for several years. Exh. OC-1, ¶ 4. Similarly, BECO received on February 8, 2002 WMLP’s responses to 33 BECO information requests, which included July 20, 2001 meeting notes of Shooshanian Engineering that reflect that the initial Olin construction would amount to 300,000 square feet with estimated loads of 6 W per square foot, or 1.8 MW. See Exh. IR-BE-2, Exh. 3, p. 5. This information gave BECO ample notice and many weeks to develop and present any supposed additional options in Mr. Jessa’s direct testimony on March 11 or his rebuttal testimony on March 27, 2002, an opportunity that BECO studiously elected not to pursue. See Exh. BE-ARJ-1, pp. 9-13.

Most fundamentally, however, it is clear that, whatever new service options BECO may belatedly have concocted, they cannot involve service comparable in quality or reliability

to the service available from WMLP. BECO, again, simply does not have an underground circuit in place that can be used to serve Olin. To the extent that BECO thinks it can serve Olin's initial load using existing facilities along Great Plain Avenue, *i.e.*, Circuit 148-H1, that frankly is nothing new, given that three of the options BECO presented on June 8, 2001 – Options 2, 3, and 4 – contemplate using that circuit for normal service. See Exh. IR-OC-1-10, Att. IR-OC-1-10, pp. 3-5. That circuit, however, like the existing circuit BECO has previously proposed to use for back-up service, Circuit 148-H4²², involves significant overhead facilities. Exh. BE-ARJ-1, pp. 9-13.

Accordingly, any new options that BECO claims to have can do nothing to alter the fact that, to provide dedicated underground normal service to Olin comparable to the service available from WMLP for \$18,000, BECO would have to construct a brand-new circuit at a cost to Olin of approximately \$1.6 million. See Tr. 4: 608; Exh. IR-OC-1-10, Att. IR-OC-1-10. p. 2 (diagram of Option 1B showing underground normal supply would be new circuit). Indeed, in its Initial Brief BECO tacitly concedes as much, given its several references to the significant cost to Olin (notwithstanding the purported new service options) in the event Olin continues to desire underground service comparable to that available from WMLP. See, *e.g.*, BECO Brief, p. 23 (“the net interconnection cost can range from very little to substantial, depending upon what Olin believes it must require”).

BECO suggests in its Initial Brief that, by foregoing cross-examination of Mr. Jessa on these purported new options, Olin and WMLP evinced a lack of true interest in cost and

²² The record reveals that to be used to serve Olin at all, BECO would have to upgrade Circuit 148-H4 from 4kV to 13.8kV and extend it by approximately 4,000 feet. See Exh. IR-OC-1-6, Att. IR-OC-1-6, handwritten notes dated 6/8/01 on Option 1A diagram.

reliability. See BECO Brief, p. 21 n. 7. In fact, however, Olin, WMLP, and the Department already had all the information necessary to make an apples-to-apples comparison of the cost to Olin for underground service from WMLP service with the cost to Olin for comparable service from BECO. By the time Mr. Jessa took the stand on Day 6 of evidentiary hearings – hearings originally estimated to require only two days – there was a wholly valid and understandable feeling by the Bench that the hearings should be concluded expeditiously. Mindful of and in full agreement with that sentiment, and having full reason to believe that the record was more than sufficient to compare BECO’s proposal for underground service with WMLP’s proposal for underground service, Olin and WMLP saw no need to prolong the proceedings with cross-examination of Mr. Jessa.²³ BECO’s claim that Olin has no true interest in cost and reliability is as illogical as it is unsupported. Indeed, the root cause of BECO’s disappointment in this regard plainly has nothing to do with the bona fides of Olin’s concerns with cost and reliability, but instead with BECO’s unfulfilled hope that Olin and WMLP prove willing dupes in BECO’s effort to drop onto the record information that BECO could and should have been provided much sooner.

G. Conclusion

In sum, BECO’s Brief, for obviously reasons, avoids and seeks to deflect attention from a direct, apples-to-apples comparison of its proposal to provide dedicated underground service to Olin with WMLP’s proposal to provide the same. Contrary to BECO’s claims, however, not only is such a comparison possible, but it overwhelmingly supports the conclusion that facts and fairness justify permitting Olin to receive service from WMLP.

²³ Mr. Jessa’s own prefiled direct testimony already provided Mr. Jessa’s position on the reliability of BECO’s five options, including the concession that underground circuits are more reliable than overhead circuits. See

VI. BECO'S ARGUMENTS REGARDING TEMPORARY SERVICE ARE A DISTRACTION

BECO argues that Olin's Petition should be denied because its temporary electrical service is "illegal" and Olin's Petition is somehow a "post-hoc attempt to legalize what it has already done." BECO Brief, p. 42. BECO's argument should be rejected.

First, the argument proceeds on the same unfounded assumption that Olin's new campus lies in BECO's exclusive service territory. See BECO Brief, p. 41. While it is true that G.L. c. 164, § 47A(b) contemplates obtaining either consent from the relevant utility or permission from the Department if a different utility wishes to provide distribution service in the first utility's exclusive franchise area, neither Olin nor WMLP believe that Olin's new campus is within BECO's territory. To the contrary, both Olin and WMLP believe that the area is part of WMLP's franchise territory. Accordingly, the statute simply does not apply to the facts at hand.²⁴

BECO argues that, by filing the petition, Olin has implicitly acknowledged the Department's authority in this matter and the need for prior approval. BECO Brief, p. 41. This, of course, is factually inaccurate. As Olin made clear in its Petition, it commenced the proceeding not because it thought it had to obtain Department approval – Olin explicitly stated that "Olin does not believe that any specific approval . . . is necessary" – but instead "to avoid a potential challenge to the propriet[or]'s of its obtaining electricity from WMLP." Petition, ¶¶

Exh. BE-ARJ-1, pp. 9-13.

²⁴ If Olin were seeking to take service from BECO, of course, then either the consent of WMLP or Department permission would be necessary, given that Olin's new campus is in WMLP's service territory.

3, 21. And, given BECO's saber-rattling, see Exh. IR-OC-1-6, Att. IR-OC-1-6 p. 86 (10/26/01 letter, B. Balcom to S. Hannabury), this concern plainly was not without foundation.

Indeed, while BECO suggests that Olin's receipt of temporary service²⁵ constitutes serious and ongoing violations that should not be countenanced, this view appears to represent a recent epiphany on BECO's part, given that BECO has known of the temporary service since the spring of 2000 and but waited until January 31, 2002 to broach the issue with the Department. Tr. 3: 409-11.

The bottom line is that the fundamental focus of this proceeding is whether Olin is in WMLP's or BECO's service territory, or in a situation permitting it to choose between the two in the provision of permanent electrical service. The Department's resolution of that issue will moot the issue of the temporary service, and there accordingly is no reason to dwell on it.

VII. CONCLUSION

For all the reasons discussed herein and as shown on the record, Olin respectfully urges the Department to make the finding of fact and conclusions of law as set forth in this Reply Brief and in Olin's Initial Brief and to allow WMLP to serve Olin's new buildings (present and future).

Respectfully submitted

Franklin W. Olin College of Engineering
By Its Counsel

²⁵ Another factual correction concerns BECO's implication that Babson is materially involved with the delivery of electricity to Olin. Although a minor piece of Babson's own facilities carry power to Olin, it is primarily Olin's own facilities.

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